JAN 2) 1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 584

FRANK GENTLES, *et al.*,

Appellants,

vs.

F. BRITTON McCONNELL, as Insurance Commissioner of the State of California, *et al.*,

Appellees.

No. 585

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, *et al.*,

Appellants,

vs.

F. BRITTON McCONNELL, as Insurance Commissioner of the State of California, *et al.*,

Appellees.

Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS.

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Appellees.

Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS.

Appellee Pacific Mutual Life Insurance Company moves pursuant to Rule 16(1) of the Revised Rules of the Supreme Court that the appeal from the final judgment of the Supreme Court of California be dismissed for want of jurisdiction on the following grounds: (1) That the appeal was not taken in conformity to statute in that there was not drawn into question in the courts below the validity of any state statute on the ground of its being repug-

nant to the Constitution, treaties, or laws of the United States, as required by 28 U. S. C., Section 1257(2); (2) That the federal questions sought to be reviewed were not timely or properly raised or expressly passed upon; (3) That the appeal does not present any substantial federal question; and (4) That the judgment rests on an adequate non-federal basis.

Opinions Below.

The opinions in the Supreme Court of California (App. pp. A1-A69)* are reported in 44 Cal. 2d 715, 285 P. 2d 636. The opinion of the District Court of Appeal of California, First Appellate District (App. pp. B1-B36) is reported at 270 P. 2d 584. The opinion of the Superior Court for Los Angeles County (App. pp. C1-C34), and the opinion and decision of the California Insurance Commissioner (App. pp. D1-D22) are not reported.

Jurisdiction.

The judgment of the Supreme Court of California (App. pp. H1-H2) was filed on June 27, 1955, and the petition for rehearing was denied without opinion on July 27, 1955. Notice of appeal was filed on October 24, 1955. The jurisdiction of this Court is sought to be invoked under Section 1257(2) of the Judicial Code (U. S. C., Title 28, Sec. 1257(2)).

Jurisdiction is challenged by this Motion.

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*References to the Appendix throughout this Motion are to the volume filed by appellants in No. 584. References to the record lodged with the Clerk will follow the pattern stated in the Jurisdictional Statement of appellants in No. 584 at page 5n.

Questions Presented.

In *Neblett v. Carpenter,* 305 U. S. 297, this court reviewed and sustained a Rehabilitation Agreement which obligated the sole stockholder of a California insurance company to dispose of his stock in accordance with a Plan of Mutualization thereafter to be formulated by a committee of insurance experts. Such a Plan was formulated and, after full hearing, approved by the State Insurance Commissioner, thus permitting but not requiring the Plan to become effective. Appellants, claiming through the sole stockholder, brought mandamus to review the Commissioner's action. The questions presented are:

1. Was there drawn in question in the courts below the validity of any state statute on the ground of its repugnance to the Constitution, treaties or laws of the United States as required for jurisdiction on appeal in this Court under 28 U. S. C., Sec. 1257(2)?

2. Did the action of the Insurance Commissioner in approving the Plan of Mutualization or the judicial review thereof in the California courts deprive Appellants of property without due process of law?

Statement.

We believe a statement of the case is warranted because the Jurisdictional Statements filed by Appellants do not present the case accurately or completely, from either a factual or legal standpoint. They state the case as though Appellants' rights as stockholders were before the courts for the first time in the present litigation. Quite the contrary is true. The facts as found by the Insurance Commissioner and as accepted by the courts below may be summarized as follows:

For many years before 1936 Appellant The Pacific Mutual Life Insurance Company of California ("Old Company") was a stock company engaged in writing life, accident and health insurance (App. p. D1). In 1936 an insurance commissioners' audit found Old Company to be in a hazardous and insolvent condition within the meaning of the Insurance Code of California (App. p. B6). The insolvency arose out of the fact that many non-cancellable accident and health policies ("non-can policies") had been issued with inadequate premium rates, and when reserves on the non-can business were required to be set up on a realistic basis, the capital and surplus of the Company were entirely wiped out and there was a deficit of at least $17,000,000 (App. p. D1). Acting pursuant to Sections 1011 and 1013 of the California Insurance Code, the Insurance Commissioner seized Old Company and was appointed Conservator on July 22, 1936 (App. p. A2).*

To preserve the outstanding insurance business, the agency organization and the good will of Old Company, the Commissioner as Conservator organized, with court approval, Appellee Pacific Mutual Life Insurance Company ("New Company") (App. p. D2). Pursuant to Section 1043 of the Insurance Code, the Commissioner as Conservator thereupon submitted to the Superior Court for approval a Rehabilitation and Reinsurance Agreement ("Rehabilitation Agreement") with New Company.

In December, 1936, after a full hearing at which all parties were represented, including Old Company and its

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*The judge who entered the original order overlooked the fact that he owned a policy issued by the Company and that he was therefore disqualified. On August 11, 1936, another judge entered an order which ratified, approved and confirmed the Commissioner's seizure of Old Company and the appointment of the Commissioner as Conservator. See *Neblett v. Carpenter*, 305 U. S. 297, 300.

stockholders, the Superior Court entered an order "approving the Commissioner's plan and agreement, ratifying the action he had taken, and authorizing him as conservator, and as liquidator, if he should be appointed as such, to carry out the rehabilitation agreement". *Neblett v. Carpenter,* 305 U. S. 297, 301. "The order of the Superior Court recites that the plan [the Rehabilitation Agreement] makes adequate provision for each class of policy holders, for the creditors, and for the stockholders; that the plan is fair and equitable; . . . and that if the old company were dissolved and its assets sold their value would be substantially less than the amount which will be realized from them under the plan." 305 U. S. at 304. The Rehabilitation agreement was executed by the parties as of December 4, 1936. The order of the Superior Court was affirmed on appeal by the Supreme Court of California (*Carpenter v. Pacific Mutual Life Ins. Co.,* 10 Cal. 2d 307, 74 P. 2d 761), and on certiorari by this Court. *Neblett v. Carpenter,* 305 U. S. 297. The binding force of the Rehabilitation Agreement and all of its provisions was finally adjudicated in that proceeding.

Pursuant to the Rehabilitation Agreement the Conservator transferred substantially all of the assets of Old Company to New Company. The capital stock of New Company was held by him for the benefit of the creditors, policyholders and stockholders of Old Company. New Company on its part reinsured Old Company's non-can policies on a reduced schedule of benefits and all of Old Company's other policies without reduction of benefits. The Rehabilitation Agreement also provided for the ultimate restoration of full non-can benefits from future earnings of New Company not reasonably required for the operation of New Company as a going concern. The

participating life policyholders of Old Company contributed $3,000,000 for the capital and surplus of New Company and in addition $1,792,118.97 to strengthen non-can reserves (App. p. B7).* The stockholders of Old Company contributed no new money or other new assets to New Company.

The Rehabilitation Agreement also contained detailed provisions for an option to mutualize New Company at the instance of its participating life policyholders.** It provided (App. pp. F24, *et seq.*) that after July 1, 1946, ten per cent of the holders of participating policies of life insurance in New Company could request the creation of an Appointing Committee consisting of the President of the Life Insurance Association of America, the President of Stanford University, and the Provost of the University of California at Los Angeles. That Committee in turn was directed to appoint a Price Determination Committee of from three to five persons "skilled in matters of insurance company valuation" (App. p. F25). The Price Determination Committee was to determine whether mutualization "can then be practicably accomplished," and if so, it was then to "determine the proper price to be paid upon such mutualization and appropriate terms of payments thereof" (App. pp. F25-F26). The Insurance Commissioner, as sole stockholder of New Company, by the terms of the Rehabilitation Agreement, "agrees to

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*As of December 31, 1948, the participating life policyholders had supplied an additional $2,005,640 to the funds of New Company for its general corporate purposes, pursuant to the provisions of the Rehabilitation Agreement (Ex. 28, p. 13a; see App. p. F8).

**Participating life policyholders have by far the largest stake in New Company. Of the Company's $361,509,000 liabilities, as of the end of 1949, $224,336,000 were liabilities to participating life policyholders (Ex. 40).

consent and hereby consents as the holder and owner of the stock of New Company to such plan of mutualization" and to "dispose of such stock in accordance with such Plan" in the event it is adopted (App. p. F27).

In 1946 the participating life policyholders, in accordance with the provisions of the Rehabilitation Agreement, initiated steps to exercise their option to mutualize the Company. The Appointing Committee designated a Price Determination Committee made up as follows: Alva J. McAndless, President of Lincoln National Life Insurance Co., Ray D. Murphy, Vice President and Chief Actuary of The Equitable Life Insurance Society of the United States, Horace R. Bassford, Vice President and Chief Actuary of the Metropolitan Life Insurance Company, and Albert J. Hettinger, an investment banker who was formerly professor of business economics at the Harvard School of Business Administration and had specialized in the valuation of insurance company stocks. The Committee employed as its Chief Actuary Joseph J. Christman, Associate Actuary of the Metropolitan Life Insurance Company. The background and experience of the Committee is set forth in detail in the opinion of the District Court of Appeal (App. pp. B16-B18).

After a study lasting over three years, the Price Determination Committee determined that mutualization could be practicably accomplished and prepared a detailed plan of mutualization (App. pp. G1-G30). That Plan fixed the price for the stock to be made up of three elements: $3,000,000 plus interest from December 31, 1948, plus augmentation of $250,000 per year for each year by which restoration of non-can benefits should be accomplished before December 31, 1973. (App. pp. G5-G6.)

The Company was obligated to pay this price when full restoration of the non-can benefits was completed and certain specified financial requirements of New Company were attained (App. pp. G6-G9).

Each step of the statutory procedure for voluntary mutualization (Secs. 11526-7 of the California Insurance Code, App. pp. E10-E12) was followed. The proposed Plan of Mutualization was submitted to and adopted by the Board of Directors of New Company (App. p. A3). Stockholder approval had been given by the Rehabilitation Agreement (*ibid.*). Since the Rehabilitation Agreement provided (App. p. F24) that the mutualization should be in accordance with the laws of California in effect at the time of the request for the creation of the Appointing Committee, the Plan was presented to the Insurance Commissioner. Section 11527 provides:

> "The Commissioner shall examine the plan submitted to him under the provisions of subdivision (c) of section 11526. He shall not approve such plan unless in his opinion the rights and interests of the insurer, its policyholders and shareholders are protected nor unless he is satisfied that the plan will be fair and equitable in its operation."

The Insurance Commissioner held a hearing upon notice to all interested parties and all persons desiring to be heard were heard (App. pp. B20-B21). By testimony and comprehensive exhibits, two members of the Price Determination Committee and its Chief Actuary explained in detail the bases upon which the Plan, including the

price and terms of payment, had been formulated (App. pp. C11-C13). Thereafter the Commissioner approved the Plan, finding that the rights and interests of New Company, its policyholders and the holder of its shares were protected and that the Plan would be fair and equitable in its operation (App. pp. D1-D22). Following his approval, the Plan was submitted to and approved by the New Company life policyholders (App. p. A4).

Appellants, Old Company and its stockholders, petitioned the Superior Court for a writ of mandamus to review the Insurance Commissioner's decision, as provided in Section 1094.5 of the California Code of Civil Procedure (App. pp. E12-E14). That court, upon all of the records of the proceedings before the Insurance Commissioner, concluded that the Commissioner had not exceeded his jurisdiction, that he had accorded a fair hearing to all parties, and that his approval of the Plan was supported by substantial evidence. Judgment was entered denying the petition for mandamus (App. pp. C1-C34). The District Court of Appeal unanimously affirmed the judgment (App. pp. B1-B36). The Supreme Court of California, by a majority vote, did likewise (App. pp. A1-A69).

The majority opinion in the court below (Gibson, C. J.) (App. pp A1-A16) held, first, that the proper section of the Insurance Code of California had been followed in the formulation and approval of the mutualization plan, basing its decision both on an analysis of the statutes themselves, and on the ground that the issue was *res*

judicata because the mutualization procedure had been specified in the Rehabilitation Agreement which had been adjudicated valid in the earlier litigation. Second, the court held that the appropriate sections of the Insurance Code had been fully complied with. Specifically, it concluded that the stockholders had properly consented by virtue of the advance consent of the Commissioner as Liquidator given by the Rehabilitation Agreement, basing its conclusion again both on the law of California and on the fact that the validity of that consent embodied in the Rehabilitation Agreement was *res judicata*. Third, the court held that the action of the Commissioner in approving the Plan was based on substantial evidence and was proper and valid. Finally, the court held that in view of the nature of the action of the Commissioner, the law of California did not require a trial *de novo* before the Superior Court, and was properly limited to a determination whether the action taken by the Commissioner was arbitrary or constituted an abuse of discretion.

Justice Traynor dissented (App. pp. A16-A21) on the ground that California statutes required court approval of the Plan of Mutualization, and that the order authorizing the Rehabilitation Agreement, as he construed it, did not eliminate the necessity for such approval. Justice Carter dissented (App. pp. A21-A69) on the ground that the action was taken under the wrong statutes and was therefore void, that *res judicata* consequently had no application, and that the Plan of Mutualization was unfair and should be disapproved. Justice Schauer concurred in the opinion of Justice Traynor, and concurred generally in the opinion of Justice Carter.

A petition for rehearing, filed on June 17, 1955, was denied without opinion on July 17, 1955.

ARGUMENT.

I.

No State Statute Was Challenged on Federal Grounds in the Courts Below, as Required for Jurisdiction Under 28 U. S. C., Section 1257(2).

Both Jurisdictional Statements assert two separate bases of jurisdiction for this appeal under Section 1257(2): first, that the validity of the mutualization provisions of the California statutes (Secs. 11525-11527 of the Insurance Code), as construed and applied, is involved; and second, that the action of the Insurance Commissioner is a "statute" within the meaning of Section 1257(2). Neither basis can be sustained.

A. The Validity of Sections 11525-11527 of the Insurance Code Was Not Drawn in Question in the Court Below.

The short answer to the first alleged basis for jurisdiction is simply that the validity of Sections 11525-11527 of the Insurance Code of California was not "drawn in question" on federal grounds in the California courts. The Petition for Mandate by which these proceedings were begun in the California Superior Court contains only one reference to the Fourteenth Amendment:

> "Said Findings and order of said Commissioner deprive petitioners, and each of them, of property without due process of law, contrary to the provisions of the Constitution of the State of California and the Fourteenth Amendment to the Constitution of the United States" (Par. XXII, Clk. Tr. 22).

The briefs filed below which have been lodged with the Clerk show Appellants made no challenge to the constitutional validity of the Insurance Code in the California

courts. The opinions in the courts below do not pass on any such issue.

It is too late for Appellants to challenge the validity of the California Insurance Code for the first time in this Court. It is essential to this Court's jurisdiction on appeal under Section 1257(2), that "there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, Treaties or laws". *Charleston Assn. v. Alderson,* 324 U. S. 182, 185; see *Memphis Natural Gas Co. v. Beeler,* 315 U. S. 649, 650-651. Appellants' failure to challenge on federal grounds the sections of the Insurance Code is not cured by objection to the action of the Insurance Commissioner under the statute; "the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis" of an appeal. *Wilson v. Cook,* 327 U. S. 474, 482.

B. The Insurance Commissioner's Action Is Not a "Statute" Within the Meaning of Section 1257(2).

The action of the Insurance Commissioner, the validity of which was drawn in question on federal grounds below, does not constitute a "statute of any state" within the meaning of 28 U. S. C., Section 1257(2). While the term "statute" has been interpreted over the dissents of Justices Holmes and Brandeis to apply to city ordinances and certain administrative orders, state action must nevertheless, as the Supreme Court said, be "legislative in character" to fall within Section 1257(2). *King Mfg. Co. v. Augusta,* 277 U. S. 100, 104-105; *Hamilton v. Regents of the University of California,* 293 U. S. 245, 258. In the *King* case, the court emphasized that "unlike other state action, legislation consists of rules having continu-

ing force and intended to be observed and applied in the future . . ." *King Mfg. Co. v. Augusta,* 277 U. S. at 104.

In no sense whatever is the Insurance Commissioner's action in approving the Plan of Mutualization "legislative in character." The courts below did not so regard it (App. pp. A14, B34).* The Commissioner's action compelled nothing (App. p. D22). It did not "order"** anyone to do anything. It was but a step (and not even the final one, since the Plan had thereafter to be approved by the policyholders) in a series of approvals which allows the company to purchase its own stock.*** Moreover, his action had no general or continuing force, it was not intended to be applied in the future, and even for the one transaction with which it was con-

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*Indeed, Section 1094.5 of the California Code of Civil Procedure, under which the Commissioner's action was reviewed below, is not available to review legislative or quasi-legislative action. *Brock v. Superior Court,* 109 Cal. App. 2d 594, 598, 241 P. 2d 283, 286-287 (1952).

**Appellants persistently mislabel the Commissioner's action in approving the Plan as an "order." The Commissioner's action contains no ordering provision and the California Supreme Court never referred to it as an order but on the contrary uniformly and meticulously referred to it as the "action" of the Commissioner. Moreover, the District Court of Appeal emphasized that "Even after the Commissioner's approval the life policyholders could have rejected the plan, had they so desired. The stockholder could have rejected the plan but for the Rehabilitation and Reinsurance Agreement, which obligated the stockholder to dispose of the stock at the price and upon the terms fixed by the Price Determination Committee. The compulsion upon the stockholder flows from the obligations of the Rehabilitation and Reinsurance Agreement and not from the Commissioner's approval of the plan" (App. pp. B34-B35).

***The Statement as to Jurisdiction in No. 585 itself points out, page 9, "A plan of voluntary mutualization adopted in accordance with Secs. 11525, *et seq.* is not binding on either the Company or the stockholders. The Company may refuse to buy or the stockholders may refuse to sell."

cerned, it did not determine any policy or fix any legal principles. It says in effect: "I find nothing wrong with the plan from any official standpoint; the Company may, therefore, proceed with the remaining steps to voluntary mutualization."

In view of the nature of the Commissioner's action, it falls outside of this Court's jurisdiction on appeal within the rule of such cases as *Ohio v. Baxter*, 332 U. S. 827 (Planning Commission's denial of zoning permit not a "statute"); *Schmidt v. Minnesota State Board*, 311 U. S. 617 (appeal dismissed from order of State Board suspending license to practice medicine for five years); *Champlin Refining Co. v. Ryan*, 304 U. S. 549 (order of state Secretary of State fixing annual franchise tax in accordance with statutory formula not a "statute"); *Catholic Order of Foresters v. North Dakota*, 301 U. S. 665 (appeal dismissed from order of state commission calling in bonds before redemption date); *Latshaw v. Missouri ex rel. Kansas City Public Service Co.*, 282 U. S. 806 (order of rate making body directing appraisal and audit preliminary to rate hearing not a "statute"); see *Standard Scale Co. v. Farrell*, 249 U. S. 571, 577 (specification of State Superintendent of Weights and Measures not a "regulation purporting to prescribe a course of action to be enforced by the power of the state").*

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*Whether the California Commissioner's action is a "statute" under Sec. 1257(2) is not controlled by decisions from other states involving proceedings for mutualization under other statutes, as Appellants contend (No. 584, p. 22n; No. 585, p. 42). Moreover, the decisions cited by Appellants do not support their text. In the only case remotely similar to the present one—*Belden v. Union Central Life Ins. Co.*, 143 Ohio St. 329, 56 N. E. 2d 629 (1944)—the court held that a statute authorizing a superintendent of insurance to approve or disapprove a mutualization plan "does not delegate legislative power." 56 N. E. 2d at p. 638.

II.

There Is No Substantial Federal Question.

A. The Binding Force of the Rehabilitation Agreement, Including the Stockholder's Consent to the Plan of Mutualization, Is Res Judicata in This Court.

The rehabilitation of the business of the Pacific Mutual Life Insurance Company was before this Court in *Neblett v. Carpenter,* 305 U. S. 297. In that case, this Court upheld the 1936 order of the California Supreme Court approving the seizure of the assets of Old Company and adjudicating valid and directing performance of the Rehibilitation Agreement. The entire modification of Appellants' property rights took place at that time through the Rehabilitation Agreement. The California Supreme Court has held that the validity of the entire Rehabilitation Agreement is *res judicata* as to all parties, including the stockholders of Old Company (App. pp. A8-A12). The Insurance Commissioner's action merely allows the carrying out of that Agreement. There is no substantial federal question presented for adjudication.

As a result of the prior litigation adjudicating valid the Rehabilitation Agreement, the following matters are *res judicata* under the decision of the court below:

(a) The Insurance Commissioner was authorized in 1936 to organize New Company, to become its sole stockholder, and to transfer the assets of Old Company to New Company;

(b) The stock of New Company is held by the Liquidator* subject to an option under which a Price Determination Committee shall determine whether mutualization is practicable and, if so, shall formulate a Plan of Mutualization and shall determine the price to be paid for the stock of New Company and the terms of payment;

(c) The Liquidator as sole stockholder of New Company is obligated to dispose of his stock in accordance with the Plan; and

(d) The stockholders of Old Company, Appellants here, have an equitable right to receive from the Liquidator so much of the proceeds of the sale of New Company's stock as is left after the payment of creditors.**

This application of *res judicata* raises no substantial federal question. Even an erroneous decision on *res judicata* is not a violation of due process, for, as Justice Holmes said, "if a mistake [in the application of *res judicata*] is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of men, not a denial of constitutional rights". *Chi-*

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*On February 2, 1937, the court, in the conservatorship proceedings, ordered the liquidation of Old Company and appointed the Insurance Commissioner as Liquidator. The validity of the order was upheld on appeal (*Carpenter v. Pacific Mutual Life Insurance Co.*, 13 Cal. 2d 306, 89 P. 2d 637 (1939)). Thus the Liquidator succeeded the conservator as the sole stockholder of New Company. Said stockholder will hereinafter be referred to as the Liquidator.

**The equitable rights of Appellants as stockholders of Old Company arise solely from the Rehabilitation Agreement. Since they contributed no new money or new assets to New Company (see *supra*, pp. 5-6), and since Old Company was insolvent, they would have been eliminated entirely but for the Agreement if the rule of absolute priority of *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, had been applied.

cago Life Ins. Co. v. Cherry, 244 U. S. 25; see also, *Angel v. Bullington,* 330 U. S. 183; *Stoll v. Gottlieb,* 305 U. S. 165, 172. No argument is necessary to demonstrate that the decision below on *res judicata* does not pass Justice Holmes' line; indeed, it is manifestly correct. Moreover, despite Appellants' suggestion to the contrary (No. 585, pp. 21-22), it is well settled that constitutional issues, equally with other issues, can be foreclosed by *res judicata. Chicot County District v. Baxter State Bank,* 308 U. S. 371; *Angel v. Bullington,* 330 U. S. 183; *Grubb v. Public Utilities Commission,* 281 U. S. 470.

Thus, the basic questions sought to be raised in the Jurisdictional Statements are not open here because they have been decided on an adequate non-federal ground—*res adjudicata.* Moreover, the holding below that the Plan of Mutualization, and the Commissioner's approval thereof, are in accordance with the Rehabilitation Agreement is a matter of state law and raises no question here. *Memphis Gas Co. v. Beeler,* 315 U. S. 649, 654. Despite all this, in an attempt to salvage something, Appellants seek to create a constitutional issue by charging that the action of the Commissioner in giving his approval to the Plan of Mutualization violates the Fourteenth Amendment. Appellants' efforts are wholly unsuccessful.

B. The Action of the Insurance Commissioner Did Not Deprive Appellants of Property Without Due Process of Law.

The lack of substance in the claim that the action of the Insurance Commissioner deprived Appellants of their property without due process of law may be demonstrated in several ways.

First, the action of the Insurance Commissioner did not deprive Appellants of "the ordinary right of a prop-

erty owner to determine when he will sell and for how much" (No. 584, p. 26) or any other right. Appellants are stockholders of Old Company, and they have the right to sell that stock at any time they see fit. They do not own the New Company stock. The stock of New Company is owned by the Liquidator and Appellants' equitable rights in that stock have been defined by and are subject to the obligations of the Rehabilitation Agreement. Appellants' right under that Agreement is to receive the proceeds (after payment of creditors) from the sale of the stock of New Company at the price and upon the terms of payment determined by the Price Determination Committee. The Plan of Mutualization approved by the Commissioner preserves this property right intact.* In the litigation nearly twenty years ago when the Rehabilitation Agreement itself was before the courts, Appellants had their opportunity to challenge the validity and propriety of the provisions of that Agreement which bound them to accept the value placed on the stock by a Price Determination Committee. There is no constitutional issue created when parties bind themselves to accept a price or valuation to be determined by appraisers appointed in accordance with a contract. *Hamilton v. Liverpool etc. Ins. Co.,* 136 U. S. 242, 255; *Omaha v. Omaha Water Co.,* 218 U. S. 180, 193-198; see *United States v. Moorman,* 338 U. S. 457, 460-462.

Second, since the Commissioner's action is "not in the nature of a law or regulation, the prohibitions of the

*The District Court of Appeal emphasized that "The basic problem for the Commissioner to determine was whether or not the price and terms of payment for the New Company stock were fixed in accordance with the Rehabilitation Agreement, for if they were, the Plan of Mutualization is fair and equitable because it gives the stockholder the price and terms he agreed to take." (App. pp. B33-B34).

Federal Constitution cannot apply." *Standard Scale Co. v. Farrell,* 249 U. S. 571, 577. The action of the Commissioner was not in any sense an order or command which could or did deprive Appellants of any property whatever. The action he took was to approve what the parties had agreed to. We urge above (*supra,* pp. 12-14), that such an action cannot possibly be classed as a "statute" within the meaning of 28 U. S. C. Section 1257(2). We say here that neither can it possibly create a substantial claim of taking of property without due process of law. As the District Court of Appeal correctly stated,

> "On this question of due process we should never lose sight of the fact that the commissioner's approval of the Plan of Mutualization did not have the effect of taking appellants' property, since it was nothing more or less than a permit and did not compel the life policyholders to approve the plan, nor the stockholder to dispose of the stock as therein provided, or the New Company to adopt the plan." (App. p. B34.)

The California Supreme Court reached the same conclusion. (App. p. A14.)

Third, and in any event, there is no basis whatever for the claim that the Commissioner's action was arbitrary and capricious or that it was not supported by substantial evidence. Three California courts have extensively reviewed and approved the action of the Commissioner, which should make it unnecessary for this Court to examine this lengthy record. Moreover, the charge that the Commissioner's action lacks "substantial evidence" verges on the fantastic in view of the fact that it is supported by the detailed and uncontradicted testimony of

two members of the Price Determination Committee and its Chief Actuary, and by comprehensive exhibits showing the basis of and the reasons for the conclusions of the Committee. However, in view of the charges made in the Jurisdictional Statement, it may be appropriate to review briefly the substantial evidence before the Commissioner which fully justified his conclusions.

Capitalization of Earnings. The uncontradicted evidence before the Commissioner showed that the Price Determination Committee valued the stock by determining its commercial or investment value.* The Committee made what Chairman McAndless testified was "one of the most complete investigations of earning power that has ever been made for any life insurance company", devoting to it approximately three years of time and 10,000 man-hours of work (Tr. pp. 134-135). Taking into account the Company's estimated future growth and other relevant factors, it projected earnings of the Company into the future (Tr. pp. 147-149).** Since under the Rehabilitation Agreement the stockholders had no claim to the earnings of the Company until after non-can benefits had been restored, "the key to determining the value of the stock was the determination of how many years' earnings would be required to restore non-can benefits (Tr. pp. 138-

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*The method used by the Committee was that advocated by Professor J. L. Bonbright in his authoritative treatise "Valuation of Property," cited with approval in *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 526. The Committee tested other possible methods of valuation and found that none would produce any value whatever for stock of New Company [Tr. pp. 141-147, 382-383, 385; Ex. 28, p. 24].

**In determining future earnings as a basis for commercial or investment value, "an estimate, as distinguished from mathematical certitude, is all that can be made." *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 526.

139). Accordingly, the Committee determined the amounts which would be necessary to restore non-can benefits and the number of years' earnings which would be required to accomplish that restoration.* They concluded that it would consume all of the Company's earnings not required for its profitable operation until the middle of 1974 (Ex. 28, pp. 3-7; Tr. pp. 149, 152).** Consequently, the Committee then considered that earnings subsequent to 1974 should be capitalized in determining the value of the stock. Applying an appropriate rate of capitalization (*infra*, p. 23), the Committee concluded that the value of the stock as of December 31, 1948, was $3,000,000 (Tr. pp. 149-150).*** The procedure thus adopted, described in detail in Exhibit 28, was anything but "speculation and guesswork" (No. 584, pp. 4, 33; No. 585, pp. 14, 19), and the Insurance Commissioner was fully justified in accepting this uncontradicted evidence of value.

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*Appellants go outside the record to attack the Committee's estimate of the period of time necessary for non-can restoration (No. 584, p. 34). Even if Appellants' figures for 1950, 1951, and 1952 were correct (and they are grossly erroneous), the argument based on such figures is an application of hindsight and cannot serve to impugn the validity of the Commissioner's determination on the basis of the record before him.

**The Committee determined that an additional reserve of $22,000,000 as of December 31, 1948, invested at 3% compound interest, would permit the gradual complete restoration of non-can benefits. To equate future earnings to the $22,000,000 figure and thus enable the Committee to determine how many years' earnings would be required, it was necessary to discount those earnings at the same 3% rate. The Committee applied no discount for the risk that these earnings might not emerge, as would have been required to capitalize these earnings (Ex. 28, pp. 6-7; Tr. p. 149). These facts make it clear that Appellants err in treating the $22,000,000 as the "value of the stream of earnings" from 1949 to 1974. (No. 584, p. 14.)

***This value takes into account certain earnings from participating insurance, as required by the Rehabilitation Agreement (App. p. F26).

Valuation as of 1948. Appellants contend that the Committee should have determined the value of the stock as of 1974 (No. 584, pp. 4, 24-25; No. 585, pp. 22-23, 25-26, 48). However, the Committee determined the value as of December 31, 1948. The decisions of the California courts holding that the Committee proceeded in accordance with the Rehabilitation Agreement have necessarily construed the Agreement as authorizing the Committee to make the valuation as of 1948.

Moreover, the stock was properly valued as of 1948, because under the Plan the Company as of that date has an obligation to pay for the stock at the time and upon the conditions stated in the Plan.* When the Plan becomes effective the Liquidator will dispose of his stock by transferring it to new voting trustees, and thereupon New Company will be obligated to pay the purchase price including interest from December 31, 1948, at the time and upon the conditions specified in the Plan. Having disposed of the stock, the Liquidator and those claiming under him will have no further right to the subsequent earnings of New Company; the voting trustees will hold the stock as security for the payment of the purchase price, and beneficial interest in the stock will be in the life policyholders of New Company. The Liquidator's right will be analogous to that of a seller who has taken a purchase money trust deed to secure payment of the purchase price.

To estimate earnings from 1974 on and then to attempt to determine their value in 1974 by discounting them to that date, as advocated by Appellants, means that the

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*The Plan did not provide for an option as was the case in *Matter of New York Title Mortgage Co.*, 171 Misc. 489, 13 N.Y.S. 2d 214, cited by Appellants (No. 584, p. 25).

risk between 1948 and 1974 that distant earnings will not emerge as predicted would be thrust upon the life policyholders instead of being borne by Appellants who improvidently caused the non-can deficit which prevents earlier payment.

Capitalization Rate. The Committee determined upon a 10 per cent capitalization rate after taking into consideration the rate at which the market capitalizes the earnings of other life insurance corporations and after a study of authoritative texts such as Bonbright: "The Valuation of Property," Dewing: "The Financial Policy of Corporation," and Badger: "Valuation of Industrial Securities" (Ex. 28, p. 12; Tr. pp. 507, 382-389). This 10 per cent rate for valuing estimated earnings to emerge many years in the future is very favorable to Appellants, since the evidence showed that in valuing the stock of the leading life insurance companies the market was discounting their *current* earnings at rates of from 12.8 per cent to 23 per cent. As Mr. Hettinger testified:

> "I know of no market that I believe would apply as low rates of discount to future earnings as those we have employed." (Tr. p. 397.)

The proper rate of discount to be applied in valuing future earnings is an appropriate subject for expert testimony, and the Commissioner was not arbitrary, as Appellants suggest (No. 585, pp. 21-22), in accepting the uncontradicted testimony of the qualified experts who appeared before him.

Augmentations. The Plan provides that if complete restoration of non-can benefits precedes 1973, the price to be paid for the stock shall be augmented by the sum of $250,000 for each year by which such restoration pre-

cedes 1973 (App. p. G6). As Chairman McAndless of the Price Determination Committee explained (Tr. p. 155), there might be a restoration of non-can benefits somewhat prior to 1973 and $250,000 is a rough average of the capitalized value as of 1948 of annual earnings estimated to emerge in distant years. (Ex. 28, p. 22.) Although it would have been logical to do so, the Plan makes no comparable downward adjustments of price in the event that restoration of non-can benefits should occur after 1973 but before the 1983 termination of the Plan. The Committee would have been justified in valuing the stock and fixing its price without any provisions for augmentations, and hence the $250,000 annual augmentation is a bonus or premium operating solely to Appellants' advantage, and provisions for its payment cannot be justly characterized as "grossly confiscatory" (No. 584, p. 30; No. 585, p. 27). Since the question of whether a bonus is to be paid cannot be determined until non-can benefits have been restored, it is in no sense "unfathomable" (No. 584, p. 31) but entirely logical and reasonable that no interest should be payable on the bonus until liability for its payment has been determined (Tr. pp. 327-329).

Interest Rate. The final element in the total price, which includes the value of the stock and the bonus for early restoration of non-can benefits, is interest. As fixed by the Plan, the interest rate for each year is the stated rate of the furthest maturity U. S. Government bonds outstanding at the end of the previous year (App. p. G6). The rate was 2½% until December 31, 1953, and since then has been 3¼%, based upon Treasury bonds due June 15, 1983. Since the stock was valued by the Price Determination Committee on the assumption

that there was no risk that earnings would not emerge between 1948 and 1973 sufficient to restore non-can benefits, it is appropriate, and certainly not "confiscatory," as Appellants say (No. 584, pp. 29-30; No. 585, p. 13), that interest during the restoration period should likewise be at a no-risk rate (Ex. 28, pp. 6-7; Tr. p. 149). The provision of the Plan that interest should be paid at the time of the payment of the price of the stock rather than currently is required by the Rehabilitation Agreement, which prohibited the use of corporate earnings for other than the restoration of non-can benefits (App. p. F16). Consequently the cases cited by Appellants relating to interest (No. 584, pp. 29-30; No. 585, p. 13) have no application; they deal with a present right to a sum of money which is withheld until a later date, which is not the situation here.

Additions to Surplus. Appellants claim that the Committee's valuation is "absurd" and an "outrageous departure" because it does not take into account "the accumulating surplus as an element of value" (No. 584, pp. 27-28).

The Committee's valuation assumed that earnings of the Company would increase from year to year in the future and it valued the stock on the basis of these assumed increased earnings. It also took into account the fact that as the Company's business grew it would increase its surplus. As Chairman McAndless of the Committee testified, maintenance of an adequate surplus in relation to assets is necessary to sell insurance competitively and to permit a company to take the risks necessary to enable it to make profitable investments (Tr. pp. 282-283). The Committee calculated that $190,000 per year plus inter-

est on that sum would keep the surplus in proper relationship to assets (Tr. pp. 546-547).

The Committee properly excluded this amount from the annual earnings which it capitalized in valuing the stock. This procedure simply excluded from the capitalized value of the earnings which would emerge in each year that portion which would necessarily be left in the business in order to produce the increased earnings estimated for future years—allowing, however, interest on the cumulative retained earnings which it assumed would be added to surplus (Tr. pp. 545-547). Appellants, however, would have this increase in surplus valued twice, by including in the valuation not only the earnings from such assets but also the assets themselves. Since the increase in assets is valued by capitalizing the earnings thereon, it would be a duplication to add to such valuation the amount by which the assets are increased. Bonbright says, in speaking of commercial or investment value,

> "But care must be taken not to include current assets which cannot be disposed of without impairing the earning capacity of the continuing business. Otherwise the appraiser would be guilty of double counting in capitalizing an earning power which is dependent, in part, on the retention of the very assets whose disposition he assumes." (Bonbright, Valuation of Property, Vol. I, p. 239.) See also: Finletter, Principles of Corporate Reorganization, p. 498.

Appellants' criticism ignores these sound bases for the Committee's action.

Deferred, Conditional Payment. The Plan provides that the purchase price for the stock shall not be paid until non-can benefits have been fully restored and the

financial condition of the Company shall be such, according to standards specified in the Plan, that the Company can make the payment and leave itself in a safe financial condition.* The Conditions specified are a minimum for the safety of the policyholders (Tr. pp. 280-281). Under the Plan, the price paid to the stockholder between 1962 and 1980 will be from a high of $7,002,500 to a low of $5,325,000, depending on the year in which payment can be made.

It is settled by the decisions below, and beyond attack here, that such deferred, conditional payment was contemplated by the Rehabilitation Agreement. Appellants' attack on this feature of the Plan (No. 584, pp. 4, 25-26; No. 585, p. 48) is an attempt to repudiate the Rehabilitation Agreement. The District Court of Appeal said,

> "Various provisions of the Rehabilitation and Reinsurance Agreement show that the agreement contemplated that the price determination committee could promulgate a Plan of Mutualization and fix the price and terms of payment for the stock prior to the full restoration of non-can benefits; and that in such case payment for the stock would be postponed until after restoration of non-can benefits had been completed. Inherent in the fact that the agreement contemplated such postponement of payment, is a

*Appellants assert (No. 584, p. 15) that the provision of the Plan conditioning payment upon the safe financial condition of the Company necessarily results in the stock having, upon the basis of required surplus, a book value at the time of payment greater than that assigned to it by the Price Determination Committee. Their argument ignores the fact that the Committee properly determined the value of the stock as of 1948 (see pp. 22-23 *supra*). In addition, it illustrates the dangers of using figures from outside the record; the hypothetical surplus which they construct includes not only corporate surplus but also surplus belonging to the participating life policyholders in which the stockholders have no interest whatever.

further fact that the agreement contemplated that the Plan of Mutualization should not obligate New Company unconditionally to make the postponed payment." (App. p. B14.)

An even more detailed analysis of the controlling provisions of the Agreement was made by the Superior Court (App. pp. C28-C30).

Since deferred, conditional payment was contemplated by the Rehabilitation Agreement, the practicable accomplishment of mutualization did not require that the Company be capable of consummating the Plan immediately but rather that the Company be capable of putting the Plan into execution with reasonable probability of success. Appellants' contention that the Committee's finding that mutualization could "then be practicably accomplished" was "plainly contrary to the fact" (No. 585, p. 11) ignores the binding effect of the state court decision interpreting the Rehabilitation Agreement as contemplating both a deferred and a conditional payment.

* * * * *

Finally, it must not be forgotten that Appellants submitted no evidence as to the proper price of the stock or as to appropriate terms of payment. There was no evidence before the Commissioner contradicting the testimony of the experts or the detailed exhibits supporting the Plan.

Section 11527 of the Insurance Code entrusts to the Insurance Commissioner the power and duty to determine whether *"in his opinion"* a plan of mutualization protects the rights and interests of the interested parties and whether *"he is satisfied"* that the plan will be fair and equitable in its operation. As this Court has said in connection with the duties of the Securities and Exchange

Commission in considering a plan of reorganization under the Public Utility Holding Company Act, the Insurance Commissioner's conclusion here

> "rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process." *Securities and Exchange Commission v. Chenery Corp.*, 332 U. S. 194, 209.

In such cases the administrative officer's conclusion will be disturbed "only if it lacks any rational and statutory foundation" *Id.* at 207.

C. The Proceedings Below Met Every Requirement of Procedural Due Process.

Trial de novo. Appellants claim that they were entitled to an independent judicial review—a trial *de novo*—of the Commissioner's approval because it was attacked as confiscatory (No. 584, pp. 37-38; No. 585, pp. 44-45). The court below held that under California law "The function of the superior court was to determine whether the action taken by the Commissioner was arbitrary or constituted an abuse of discretion" and that it properly refused to conduct a trial *de novo* (App. p. A14). This construction of the California law is not open to challenge in this Court. *Neblett v. Carpenter*, 305 U. S. 297, 302.

The Fourteenth Amendment requires no more. Recent decisions of this Court establish that courts need

not conduct a trial *de novo* in reviewing the action of administrative agencies. *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U. S. 341, 349; *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 570, 576. Moreover, this Court has expressly sanctioned the "substantial evidence" rule as applied to judicial review of administrative determinations of value. *Securities and Exchange Commission v. Central Illinois Securities Corp.*, 338 U. S. 96, 126 (1949); *Ecker v. Western Pacific R. Corp.*, 318 U. S. 448, 477.

These cases show that the *Ben Avon* and *St. Joseph Stockyards* cases, upon which appellants base their argument (No. 584, pp. 37-38), have been limited to their special facts and do not require a trial *de novo* whenever action by a state agency is attacked as confiscatory. In *American Trucking Assn. v. United States*, 344 U. S. 298, 321, this Court emphasized that " 'Confiscatory' is not a magic word" and that the "claim of rate confiscation" stands on a "fundamentally different footing."

In the *Trucking Assn.* case, this Court held that the appellants there were not entitled to a hearing *de novo* because they had been afforded an opportunity to present evidence before the Commission and because of the nature of the order under attack. 344 U. S. at pp. 320-322. In the present case, Appellants had ample opportunity to present evidence to the Commissioner. Indeed in the Superior Court, Appellants were offered, but declined, an opportunity to make a showing which would warrant the remand of the case to the Insurance Commissioner for

the taking of additional evidence as permitted by Section 1094.5 of the Code of Civil Procedure (Clk. Tr. pp. 220, 236). Moreover, as we have pointed out, the administrative action involved here is not an order, but merely an action approving the Plan by which the Company might purchase its own stock. In these circumstances, the Fourteenth Amendment does not require that California afford Appellants a trial *de novo.*

Alleged Conflict of Interests. The charge by Appellants (No. 584, p. 39) that the Commissioner was involved in a "hopeless conflict of interests" requires only brief mention. The argument is that the Commissioner could not properly discharge his duties under Section 11527 of the California Insurance Code because, as Liquidator, he was bound to consent to the Plan. This circumstance, however, was contemplated by the Rehabilitation Agreement itself. Moreover, the fact that consent had been given by one Commissioner in 1936 did not mean that the mind of another Commissioner in 1950 was "irrevocably closed on the subject," or that the latter Commissioner would not conscientiously perform his statutory duty. See *Federal Trade Commission v. Cement Institute,* 333 U. S. 683, 701. Furthermore, since the Commissioner's approval is essential to mutualization, the rule of necessity would enable him to act even had there been a real conflict of interest. *Evans v. Gore,* 253 U. S. 245, 247-248; *Brinkley v. Hassig,* 83 F. 2d 351, 357 (10th Cir. 1936).

III.

There Is No Important or Recurrent Question of Federal Law Involved.

Appellants here challenge the California Insurance Commissioner's approval of a unique and necessarily complex Plan of Mutualization. It is highly unlikely, in view of the special circumstances of the Plan, that a similar question will ever occur again. Enough has been said above to show that the questions here cannot have significance beyond the particular facts and parties involved. The claims of Appellants that substantial sums of money may be involved will not suffice. Review in this Court is not warranted where, as here, the problem does not reach beyond the "episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74.

Conclusion.

For the above reasons Appellee Pacific Mutual Life Insurance Company submits that the Appeal herein should be dismissed. If the papers on appeal are to be treated as petitions for certiorari pursuant to 28 U. S. C., Section 2103, certiorari should be denied.

Respectfully submitted,

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January, 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 584

FRANK GENTLES, *et al.*,

Appellants,

vs.

F. BRITTON McCONNELL, as Insurance Commissioner of the State of California, *et al.*,

Appellees.

No. 585

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, *et al.*,

Appellants,

vs.

F. BRITTON McCONNELL, as Insurance Commissioner of the State of California, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION TO DISMISS APPEAL.

Appellee, F. Britton McConnell, as Insurance Commissioner of the State of California, and F. Britton McConnell, Insurance Commissioner of the State of California, as Liquidator of The Pacific Mutual Life Insurance Company of California, moves the court to dismiss the appeal herein on the following grounds:

1. The appeal is not within the appellate jurisdiction of this court, since the validity of no statute is drawn in question.

2. The appeal does not present a substantial federal question.

3. The judgment rests on an adequate non-federal basis.

Preliminary Statement.

F. Britton McConnell, the moving party, appears here in his official position as Insurance Commissioner of the State of California. References to the "Commissioner" or the "Liquidator" herein will usually refer, not to him personally, but to one of his predecessors.

Indeed, Commissioner McConnell is the seventh Insurance Commissioner to act as Liquidator of Old Company in a period of nearly twenty years: Commissioner Carpenter entered into the Rehabilitation Agreement hereinafter discussed; he was followed in office by Commissioner Goodcell and he by Commissioner Caminetti, during whose term the Rehabilitation Agreement was again reviewed and upheld (*Neblett v. Pacific Mutual* (1943), 22 Cal. 2d 393). Then followed Commissioner Garrison and then Commissioner Downey, whose approval of the Mutualization Plan is here under review. The proceedings in the State Courts upholding that decision were conducted by Commissioner Maloney. Commissioner McConnell (the present Appellee) assumed office shortly before the decision of the California Supreme Court here under review, and was duly substituted as a party in the proceeding.

Summary of Argument.

1. Appellate Jurisdiction.

Appellants did not raise in any of the state courts any question as to the constitutionality of the mutualization statutes (Cal. Ins. Code, secs. 11525-7), either absolutely or as construed and applied.

The Insurance Commissioner's "opinion and decision" is not legislative in character; and, although it was broadly attacked below as violative of due process, appellants have not heretofore treated it as legislative in character.

2. There Was No Deprivation of Property.

Although Appellants assert that the approval of the Commissioner "binds" them to a sale of stock, the decision of the California Court is explicit that

> "The approval of the mutualization plan by the Commissioner did not involve any deprivation of property rights or vested rights; it was in essence a permit or license authorizing the new company to purchase its own stock." [Juris. St. (Co.) Appx. p. 13a; Juris. St. (Gentles) Appx. p. A-14.]

The stockholder of New Company (*i.e.*, the Liquidator, in whose right appellants sue) is left free by the Commissioner's approval to sell or not as he sees fit, except as the contract of his predecessor, made in 1936 and not here under review, is enforceable against him.

Appellants' real complaint is that the Liquidator proposes to carry out that contract; but his making of the contract was approved by the California courts in 1936, in a proceeding to which appellants (or their predecessors) were parties, and which has been final for nearly a score of years.

3. California Is Not Constitutionally Required to Examine the Wisdom of Contracts and to Relieve a Contracting Party of a Contract of Which He Repents.

Appellants complain that the California courts "wrote out of Sec. 11527 of the Insurance Code" a (supposed) requirement that the Commissioner withhold approval unless it appears that the price to be paid thereunder is one which would provide the equivalent of full compensation under an eminent domain statute. [Juris. St. (Gentles) p. 20. See also Juris. St. (Co.) p. 43, *et seq.*]

Since the decision is one of the highest State court (and is accordingly the authoritative interpretation of the statute) it is doubtless more accurate to say that the State Legislature has not seen fit to prohibit a stockholder from voluntarily disposing of his stock merely because he is not receiving a fully compensatory price.

Our attention has not been called to any authority (and we know of none) suggesting that California is constitutionally required so to interfere with the freedom of contract.

4. There Was Ample Evidence to Sustain the Determination That the Mutualization Price Was Fair.

Despite the fact that, under the statute as construed by the California courts, the Commissioner was not required to determine the adequacy of the price the stockholder had agreed to take, he did receive lengthy testimony from highly competent experts, which fully sustained his decision. The new Company was earning less than $1,000,000 a year; and the holders of non-can policies had a prior claim to those earnings in the amount of some $22,000,000 (plus interest). The determination of the experts that the value of the stock did not exceed $3,000,-

000 under those circumstances is not surprising; and the attempts of Appellants to reinterpret the data on which the experts relied are misleading and unconvincing.

5. There Was No Improper Dual Interest.

As the California Supreme Court points out [Juris. St. (Co.) Appx. p. 6a; Juris. Ct. (Gentles) Appx. p. A7], the fact that Commissioner Carpenter, as Conservator, in 1936 consented to such plan of mutualization as a committee might submit, could scarcely disqualify Commissioner Downey from passing on the fairness of the plan as submitted in 1950. Moreover, as has frequently been held, disqualification will not be permitted to destroy the statutory scheme by removing the one officer whose duty it is to act.

Statement of Facts.

The Company being mutualized is Pacific Mutual Life Insurance Company—"New Company."

Appellants are not stockholders of New Company, and have no direct interest in it. Old Company has a residual interest, somewhat akin to a bankrupt's interest in property held by a trustee in bankruptcy; and the other appellants' interest is that of stockholders of Old Company.

The sole stockholder of New Company is the Insurance Commissioner of the State of California, acting as Liquidator under the California statutes[1] (or, more accurately,

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[1]The Insurance Commissioner is made a party to these proceedings in two capacities. *One:* in his administrative capacity as a State Officer he (*i. e.*, Commissioner Downey, in 1950) approved the plan of mutualization; and the proceedings below sought to compel him to reverse the ruling. When we have reference to him primarily in that capacity, we shall refer to him as "Commissioner." *Two:* he is and he and his predecessors (commencing

legal title is in certain Voting Trustees to whom the stock was transferred as permitted by California law: *Caminetti v. Pacific Mutual* (1943), 22 Cal. 2d 344). He acquired his title as the "statutory successor" to Old Company. (*Caminetti v. Guaranty Union L. Ins. Co.* (1943), 22 Cal. 2d 759, 763-4; see also *Relfe v. Rundle* (1881), 103 U. S. 22, 225.)

Accordingly, it is the Liquidator whose rights are affected by the proposed mutualization. Appellants therefore made demand on him to bring the mandamus proceeding; and upon his refusal, instituted it themselves as a derivative action.[2] [Clk. Tr. 4, see also Juris. St. (Co.), p. 45, note 23.]

Since the Commissioner, before approving the plan, was required by statute to determine whether, in his opinion, the rights and interests of the shareholder were protected by the plan,[3] it is necessary to examine the background to see what the "rights" of the shareholder (and of appellants) were.

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with Commissioner Carpenter in 1936) have been, the "statutory successor" of Old Company (as Conservator from mid-1936 to February 1937; as Liquidator thereafter), and as such he became the owner of all of the stock of New Company. When we have reference to him primarily in that capacity, we shall refer to him as "Liquidator."

[2]The California District Court of Appeal referred to this situation in saying that the evidence was not insufficient to justify the Commissioner's conclusion that the mutualization plan protected the rights of "all interested parties, including the stockholder, *in whose right the appellants sue.*" [Juris. St. (Co.) Appx. p. 81a; Juris. Statement (Gentle) Appx. p. B-23].

Note: There are two Jurisdictional Statements on file—one on behalf of Old Company and two individuals; the other on behalf of four individuals. We distinguish the two Statements as above.

[3]Calif. Ins. Code, sec. 11527; Juris. St. (Co.) Appx. p. 169a-170a; Juris. St. (Gentles) Appx. p. E-11-12.

Seizure of Old Company.

In 1936 the then Insurance Commissioner found Old Company to be insolvent;[4] and, acting under the statutory procedure provided by California, took over its assets as Conservator (later Liquidator). Although initial orders made in the court proceeding were void,[5] they were followed some three weeks later by a valid order.[6] (See *Carpenter v. Pac. Mutual* (1937), 10 Cal. 2d 307, *324,* affd. *Neblett v. Carpenter* (1938), 305 U. S. 297, *301.*)

Since 1936 the assets theretofore owned by Old Company have been vested in the Conservator-Liquidator. Since 1936 neither the Old Company nor its stockholders,[7] has had the right to determine when such assets shall be sold and for how much. If that is the deprivation of property of which appellants complain, their appeal is from the wrong order, and is nearly twenty years too late.

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[4]Whether there was an insolvency in the "bankruptcy or equity senses of the term" [See Juris. St. (Co.) p. 6], or whether its difficulties were "of a temporary character" [Juris. St. (Gentles) p. 6, note: Juris. St. (Co.) p. 18] is here immaterial. That action is not under attack. However, it may be noted that its liabilities exceeded its assets by at least $17,000,000; and today, after nearly 20 years, the New Company has not yet been able to make up the deficits.

[5]The orders were found to be void when it was found that the judge who made them was a policyholder in Old Company. [*Cf.* Juris. St. (Co.) p. 7, p. 29.] Two Justices of the California Supreme Court disqualified themselves for the same reason in 1937, and one did so in the instant proceeding. One Justice of the Supreme Court of the United States similarly disqualified himself in 1938.

[6]Old Company is in error in asserting that this order was made *ex parte* [Juris. St. (Co.) p. 7.] (See *Carpenter v. Pac. Mutual* (1938), 13 Cal. 2d 306, 316.)

[7]As suggested by Juris. St. (Gentle) p. 26.

Rehabilitation Agreement: Generally.

The Conservator dealt with the problem before him by organizing New Company, and by transferring to it substantially all of the assets formerly owned by Old Company pursuant to a Rehabilitation Agreement under which New Company assumed the obligations of Old Company *except* those arising under certain "Non-Can" policies. The latter were only partially asumed, but New Company agreed to use all of its funds available for general corporate purposes, and not reasonably required for its operations, for the restoration of the full benefits under those policies. [Juris. St. (Gentles), p. F-16, *et seq.*]

The first essential in the scheme of rehabilitation was, accordingly, that New Company be set up in such a manner that it could operate successfully and profitably in competition with other insurance companies. (See discussion in *Carpenter v. Pac. Mutual* (1937), 10 Cal. 2d 307, 336-7.) Most of the provisions of the Rehabilitation Agreement were directed to that end.

Rehabilitation Agreement: Provisions for Mutualization.

As the State Supreme Court observes, "The Commissioner apparently concluded that a plan for mutualization which could not be destroyed by future action or nonaction of the shareholders was necessary as a means of inducing both former and prospective policyholders to deal with the new company and thus permit its continued existence." [Juris. St. (Co.), Appx. p. 12a; Juris. St. (Gentles), Appx. p. A-13.]

Accordingly, the Rehabilitation Agreement contained what is described as an "option to mutualize." [See

Juris. St. (Co.), Appx. pp. 149a, 150a, 151a; Juris. St. (Gentles), Appx. pp. F-28-30.]

The option is spelled out in the Agreement in considerable detail [Rehab. Agmt. Art. 20; Juris. St. (Gentles), Appx. p. F-24 *et seq.;* Juris. St. (Co.), Appx. pp. 146a-152a].

The option is exercisable by the holders of Participating Life Insurance policies. In should be observed that they paid handsomely for their option: $4,792,118.77 was transferred from the surplus of the Participating Life Department of Old Company to the general funds of New Company, and 10% of the profits of the participating life policies written by Old Company [amounting to more than $2,000,000; Ex. 28, p. 13-A] has been similarly transferred [Rehab. Agmt. Art. 6, Juris. St. (Gentles), Appx. pp. F-6-10]. The participating policyholders had a claim to these funds prior to the claims of stockholders. [Juris. St. (Co.), Appx. p. 68a; Juris. St. (Gentles), Appx. pp. B-7-8.]

On the written request of 10% of the holders of participating life policies, made after the expiration of ten years, an Appointing Committee consisting of the President of the Life Insurance Association of America,[8] the President of Stanford University, and the Provost of the University of California at Los Angeles would be established.

That Committee would appoint not less than three nor more than five persons "skilled in insurance company valuation" to determine whether mutualization was "then prac-

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[8]Formerly known as the "Association of Life Insurance Presidents."

ticable"; and, if so, to determine the "proper price" to be paid on mutualization, to fix the time and terms of payment, and to prepare a plan of mutualization, which might include a voting trust, with provisions for successor trustees.

New Company expressly agreed that if 10% of the participating life policyholders so requested it would submit the plan in accordance with California law. The Conservator, for himself and his successors in interest, "agrees to consent and hereby consents, as the holder and owner of the stock of New Company, to such plan of mutualization."

And further, "In the event said plan of mutualization is adopted, the Conservator, or a Liquidator as aforesaid, shall dispose of said stock in accordance with such plan." [Juris. St. (Gentles) Appx. p. F-27; Juris. St. (Co.) Appx. p. 148a.]

Rehabilitation Agreement: Adoption and Approval.

Before executing the Rehabilitation Agreement, the Conservator [in accordance with California law: Cal. Ins. Code, Sec. 1043, Juris. St. (Co.) Appx. p. 177a; Juris. St. (Gentles) Appx. p. B-1] submitted it to the appropriate court for approval.

Old Company was a party to that proceeding; and representative appearances were made by many of its stockholders. [Recitals, Ex. 8.]

The California court approved the Rehabilitation Agreement and its execution; and authorized the Liquidator "without further order of this court, fully and faithfully to perform, carry out, and discharge" its terms. [Ex. 8, par. 15.]

The Supreme Court of California (*Carpenter v. Pacific Mutual* (1937), 10 Cal. 2d 307), and this Court, on certiorari, (*Neblett v. Carpenter* (1938), 305 U. S. 297) affirmed.

Validity of Mutualization Provisions of Rehabilitation Agreement.

The Supreme Court of California held—as a matter of California law—that

> ". . . the stockholders of a solvent company can contract to consent to a future plan of voluntary mutualization (*Cf.* Market St. Ry. Co. v. Hellman, 109 Cal. 571, 586-7)[9] and no sound reason appears why such an agreement is improper merely because the shares are held by the commissioner as conservator of a seized insurer[10] . . . The powers vested in the commissioner by sections 1037 and 1043[11] are sufficiently broad to authorize him, as sole stockholder, to give advance consent to the plan of mutualization. Moreover, the validity of all portions of the rehabilitation agreement, including the provision for advance consent, is *res judicata.*" [Juris. St. (Co.) Appx. p. 12a; Juris. St. (Gentles) Appx. p. A-13.]

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[9]The Court might have added that options and contracts at a price to be fixed by valuers are commonplace in California and elsewhere: James, Options (1916), Sec. 1212, p. 563; *Glenn v. Bacon* (1927), 86 Cal. App. 58, 69; *Calif. etc. Confs. of M. E. Churches v. Seitz* (1887), 74 Cal. 287; and authorities cited by California District Court of Appeal, Juris. St. (Co.) Appx. p. 90a; Juris. St. (Gentles) Appx. p. B-32.

[10]Again the Court might have added that such contracts made by fiduciaries are not uncommon. *Ross v. Freeman* (1935), 2 Del. Ch. 44; *Phelps v. Harris* (1880), 101 U. S. 370, 383; *Re Rosenbaum Grain Corp.* (1936; C. C. A. 7th), 83 F. 2d 391, 394; 2 Scott, Trusts (1939), Sec. 190.8, p. 1034; Restatement Trusts, Sec. 190 comm. k.

[11]Of the California Insurance Code.

The "Rights and Interests" of the Stockholder of New Company.

In the words of the California District Court of Appeal:

> "The result of Judge Willis' order of December 4, 1936, was that . . . the conservator acquired valid title to all of the capital stock of New Company, subject, however, to an option to the participating life policyholders of New Company, through mutualization proceedings initiated after approximately 10 years, to cause New Company to acquire such stock at the price and on the terms fixed by a duly appointed price determination committee, in the event that such committee should determine that in its opinion mutualization was practicable." [Juris. St. (Co.) Appx. p. 74a; Juris. St. (Gentles) Appx. p. B-14.]

Initiation of Mutualization.

In 1946, on the written request of more than 10% of the participating life policyholders [Exs. 10, 11] the Appointing Committee[12] was created. That Committee appointed the Price Determination Committee, consisting of Alva J. McAndless, President of Lincoln National Life Insurance Company, a stock company and the tenth largest life insurance company in the United States; Ray D. Murphy, Vice President and Chief Actuary of The Equitable Life Insurance Company of the United States, one of the five largest in the country; Horace R. Bassford, Vice President and Chief Actuary of Metropolitan Life Insurance Company, the largest life insurance com-

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[12]George Willard Smith, President of the Life Insurance Association of America; Dr. Donald B. Tressider, President of Stanford; and Dr. Clarence A. Dykstra, Provost of the University of California at Los Angeles.

pany in the country; and Albert J. Hettinger, a partner in the well-known investment banking firm of Lazard Freres and Company and former professor of Business Economics in the Harvard Graduate School of Business Administration.[13]

Broad executive experience (Mr. McAndless); practical investment experience (Mr. Hettinger); a professor's theoretical knowledge of economic theory, coupled with its practical application in the Federal Reserve system (Mr. Hettinger); and the actuary's training in the practical measurement and evaluation of future contingencies (Messrs. Bassford, and Murphy, as well as McAndless), were combined to furnish what was doubtless the most able and well-balanced group ever to study any comparable problem.

The Committee made what Mr. McAndless characterized as "one of the most complete investigations of earning power that has ever been made for any life insurance company." [Tr. p. 134, line 1.] It occupied a period of some three years, and approximately 10,000 man-hours of work were expended by the staff. [Tr. p. 135, line 25.]

The Committee determined that mutualization was then practicable;[14] and prepared the Plan of Mutualization here in controversy. [Juris. St. (Co.) Appx. pp. 152a, *et seq.;* Juris. St. (Gentles) Appx. G.]

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[13]A further summary of the background and experience of the committee members appears in the opinion of the District Court of Appeal [Juris. St. (Co.) Appx. pp. 75a-77a; Juris. St. (Gentles) Appx. p. B16-18.]

[14]Appellants Gentles *et al.* suggest that this determination is at odds with the provisions for deferred payment. [Juris. St. (Gentles) p. 104.] The trial court pointed out that the Rehabilitation Agreement contemplated deferred payments; and that the requirement of a determination that mutualization was "then practicable"

Terms of Mutualization Plan.

The plan fixes the purchase price of the stock at $3,000,000, with interest at Government Bond rates; but with a provision that if restoration of Non-Can benefits is accomplished prior to 1973, the price shall be increased by $250,000 for each full year by which such restoration antedates that date.

"For the purpose of accumulating a fund to be used in payment, at least in part" of the purchase price, the Company is directed to set aside in a separate fund 5% of the profits of the Participating Department (excluding profits allocable to policies issued by Old Company).[15]

Payment is to be made when three conditions shall all have been met:

1. Restoration of Non-Can benefits is completed.

2. The Special Fund, plus the amount of capital and corporate surplus equals or exceeds the purchase price.

3. The admitted assets of New Company, after paying for the shares, will exceed its liabilities by 4% of its assets, plus 25% of the preceding years premium on one year term Group policies, and on all of its Accident and Health insurance.

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related to the fact that in 1936, before operations under the Rehabilitation Agreement had commenced, it was impossible to make any predictions on which a valuation of the enterprise could be based. [Juris. St. (Co.) Appx. p. 118a-119a; Juris. St. (Gentles) Appx. p. C-28.] This interpretation of the agreement has now been conclusively adopted by the appellate courts of California.

[15]It will be recalled that under the Rehabilitation Agreement, the profits of the Participating Department are not available for general corporate purposes, but belong to the policyholders of that Department as if it were a separate mutual insurance company. [Ex. 9, Par. 6; Juris. St. (Gentles) Appx. pp. F-6-10.]

If the purchase price is not paid on or before December 31, 1983, the plan shall be considered to have failed, and shall terminate.

Pending payment of the purchase price, a new voting trust is set up. This procedure was expressly contemplated by the Rehabilitation Agreement [Ex. 9, par. 20(a); Juris. St. (Co.) Appx. p. 148a; Juris. St. (Gentles) Appx. p. F-26]; and is expressly permitted by statute. [Ins. Code, Sec. 11529.5; Juris. St. (Co.) Appx. p. 173a.]

Proceedings for Mutualization.

More than 10% of the participating life policyholders having requested the submission of the plan,[16] New Company, in accordance with its agreement in the Rehabilitation Agreement and with the applicable statute, adopted the Plan. It was adopted by the board of directors, and the approval of the shareholders had been given in the Rehabilitation Agreement. The California Supreme Court has authoritatively determined that this adoption and approval complied with state law.[17]

Proceedings Before the Commissioner.

At the hearing before the Commissioner, Mr. McAndless and Mr. Hettinger were qualified as experts and

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[16]Old Company asserts that the life policyholders have not appeared in this proceeding [Juris. St. (Co.) p. 31, Note 17], and suggests a lack of interest on their part. However, they have twice requested mutualization; and more than 40,000 of them made request for the submission of this particular plan. [See recital, Ex. 19.]

[17]Juris. St. (Co.) Appx. pp. 11a-12a; Juris. St. (Gentles) Appx. pp. A12-A14. In addition to the consent in the Rehabilitation Agreement, the Voting Trustees executed a formal approval. [Exs. 21, 22.] See opinion of District Court of Appeal, Juris. St. (Co.) Appx. pp. 89a-90a; Juris. St. (Gentles) Appx. pp. B-31-2.

testified at length. Their ultimate conclusion was that the value of the stock of New Company was $2,500,000. [Tr. pp. 153-4; Tr. pp. 396-7.] To this amount the Committee had added $500,000 under a requirement of the Rehabilitation Agreement that certain participating insurance should be treated as non-participating for the purpose of fixing the mutualization price. [Juris. St. (Co.) Appx. p. 147a; Juris. St. (Gentles) Appx. p. F-26.]

The witnesses did not content themselves with stating their ultimate conclusion. They testified at length as to their reasons, and introduced [Ex. 28] a volume containing their major data.

They pointed out that "by the processes ordinarily employed in the evaluation of an enterprise, the stockholders' interest would be considered valueless or of negligible value." [Ex. 28, p. 23.] That is, the $22,000,000 prior claims of the Non-Can policies would exhaust any value that would ordinarily be placed on a company earning less than $1,000,000 a year, or with the business in force, or the capital and surplus, of New Company.

However, by attempting to forecast a "pattern" of future profits—increasing from some $872,000 a year in 1949 to some $3,351,000 a year in 2000 A. D.; and capitalizing those estimated profits, they arrived at a figure ($2,600,000) consistent, when adjusted, with their estimated value of $2,500,000.

No evidence was offered to the contrary.

The Commissioner's Decision.

The California statute provides that the Commissioner shall not approve a plan of mutualization "unless in his opinion the rights and interests of the insurer, its policyholders and shareholders are protected, and unless he is satisfied that the plan will be fair and equitable in its operation. [Cal. Ins. Code, Sec. 11527; Juris. St. (Co.) Appx. pp. 169a-170a; Juris. St. (Gentles) Appx. pp. E-11-12.]

As authoritatively construed by the California courts,

> "The basic problem for the Commissioner to determine was whether or not the price and terms of payment for the New Company stock were fixed in accordance with the rehabilitation agreement, for if they were, the Plan of Mutualization is fair and equitable because it gives the stockholder the price and terms he agreed to take." [District Court of Appeal; Juris. St. (Co.) Appx. p. 91a; Juris. St. (Gentles) Appx. pp. B-33-4.]

However, the Commissioner did not rest there. He considered the testimony of the members of the Committee—the only evidence before him—and concluded that "there was abundant evidence to support the findings of the committee as to the price of three million dollars, both upon the basis of a price to be paid for non-participating life insurance in force, and upon other bases." [Juris. St. (Co.) Appx. p. 141a; Juris. St. (Gentles) Appx. p. D-17.]

His "Opinion and Decision" concludes with his finding, in the words of the statute; and with his conclusion that the plan is lawful and meets the requirements of the Code.

The operative decision is simply "The plan is therefore hereby approved." [Juris. St. (Co.) Appx. p. 145a; Juris. St. (Gentles) Appx. p. D-22.]

As we have pointed out, and as the California courts have held, it does not "order" anything, or compel anything.

Court Proceedings.

The trial court, the District Court of Appeal [See particularly Juris. St. (Co.) Appx. pp. 81a-83a; Juris. St. (Gentles) Appx. pp. B-22-5], and the Supreme Court [See Juris. St. (Co.) Appx. pp. 13a-14a; Juris. St. (Gentles) Appx. p. A-15] have all held that there was adequate evidence to support the findings of the Commissioner.

ARGUMENT.

I.

The Case Is Not Within the Appellate Jurisdiction of This Court.

A. The Constitutionality of the California Insurance Code Sections Were Not "Drawn in Question."

Appellants do not point out, nor have we found, any place in these proceedings prior to their notice of appeal to this Court at which they have asserted the unconstitutionality of California Insurance Code sections 11525-7, either of themselves or as applied.

Such challenge comes too late.

Charleston Assn. v. Alderson (1945), 324 U. S. 182, 185;

Jett Bros. Distilling Co. v. City of Carrollton (1920), 252 U. S. 1, 6.

B. The Decision of the Insurance Commissioner Was Not Legislative in Character.

Appellants urge that an "order" of a state administrative body may be legislative in character, and hence a "statute" within the meaning of 28 U. S. C., Sec. 1257(2).

Of course, that term "is used to include every act legislative in character to which the state gives sanction . . ." (*Hamilton v. University of California* (1934), 293 U. S. 245, 258).

But it is clear here that California gives no "sanction" to the Commissioner's approval; the State courts have expressly held that it is a mere permit or license [Juris.

St. (Co.) Appx. p. 13a; Juris. St. (Gentles) Appx. p. A-14], and "did not compel the life policyholders to approve the plan, nor the stockholder to dispose of the stock as therein provided, or the New Company to adopt the plan." [Juris. St. (Co.) Appx. pp. 91a-92a; Juris. St. (Gentles) Appx. p. B-34.]

Nor was the Commissioner's action legislative in character—as Appellants themselves observed in the State courts:

> "The Commissioner was not conducting hearings in the legislative field; he did not issue an order setting forth rules of future conduct for an entire industry or type of business." (Pet. for Reh., Dist. Ct. of A., p. 58; See also Pet. for Hearing, Sup. Ct., p. 60.)

On the contrary, as Appellants stated to the State Supreme Court:

> "If the question before the board or officer is whether a particular person should be granted a license or permit to engage in a particular business or profession, then the board or officer is generally considered to be acting in an administrative or executive capacity." (Pet. for Hearing, Sup. Ct., p. 61.)

Accord: *Bank of Italy v. Johnson* (1926), 200 Cal. 1, 13, 16.

It is quite apparent from the foregoing that the State court was not told it was being asked to determine the constitutionality of a "statute of the state"—that such matter was not "drawn in question."

II.

The Effect of the Commissioner's Action Is a Matter of State Law. As the State Courts Have Determined, It Deprives No One of Property.

Appellants repeatedly claim that the Commissioner's approval "binds them" to a sale of the stock. [*e. g.*, Juris. St. (Co.) pp. 4, 43; Juris. St. (Gentles) p. 3.]

But the California courts have explicity held to the contrary.

The California Supreme Court says:

> "The approval of the mutualization plan by the commissioner did not involve any deprivation of property or vested rights; it was in effect a permit or license authorizing the new company to purchase its own stock." [Juris. St. (Co.) Appx. p. 13a; Juris. St. (Gentles) Appx. p. A-14.]

The District Court of Appeal says:

> "On this question of due process we should never lose sight of the fact that the commissioner's approval of the Plan of Mutualization did not have the effect of taking appellants' property, since it was nothing more or less than a permit, and did not compel the life policyholders to approve the plan, nor the stockholder to dispose of the stock as therein provided, or the New Company to adopt the plan." [Juris. St. (Co.) Appx. pp. 91a, 92a; Juris. St. (Gentles) Appx. B-34.]

The question of the meaning and application of the state statutes is manifestly one of state law.

Heim v. McCall (1915), 239 U. S. 175, 189;

Neblett v. Carpenter (1938), 305 U. S. 297, 302.

Indeed, Appellants seem to agree as to the effect of the approval. [See Juris. St. (Co.) p. 9; Juris. St. (Gentles) p. 36.]

The stockholder (*i. e.*, the Liquidator, in whose right Appellants sue) is manifestly not unconstitutionally deprived of property when his property may be taken only as he voluntarily chooses to dispose of it by contract.

To borrow a dictum of this Court:

> "It (a Fair Trade statute) *permits*[18] the designated private persons to contract with respect thereto. It contains no element of compulsion, but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they see fit. Thus far the act is plainly not open to objection; and none seems to be made."
>
> *Old Dearborn Co. v. Seagram Corp.* (1936), 299 U. S. 183, 192.

As the District Court of Appeal observes,

> "The compulsion upon the stockholder flows from the obligations of the Rehabilitation and Reinsurance Agreement, and not from the commissioner's approval of the plan." [Juris. St. (Co.) Appx. p. 92a; Juris. St. (Gentles) Appx. pp. B-34-5.]

If the covenant in the Rehabilitation Agreement had been invalid (as Appellants sought to urge below), the Liquidator would be entirely free to refuse to dispose of his stock.

But the validity of that contract was clearly a matter purely of state law; and in addition, the order adjudicating its validity (made December 4, 1936) is not here under review, and is long since final. The State courts' deter-

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[18]Emphasis in original.

mination of the validity of the contract rests in part [*e. g.*, Juris. St. (Co.) Appx. p. 12a; Juris. St. (Gentles) Appx. p. A-13] on the adequate non-federal ground that its validity was *res judicata*.

> *City & County of San Francisco v. Itsell* (1890), 133 U. S. 65, 67.

The complaint of Appellants is that they *will be* deprived of a property interest *if* the Liquidator carries out his contract.

But again, they were afforded ample opportunity to be heard in 1936 on the question as to whether he should make that contract. As the District Court of Appeal says,

> "Petitioners (Appellants) were parties to the proceeding in which the rehabilitation agreement was proposed, and their representatives participated in seeking that approval. They may not now complain of its terms." [Juris. St. (Co.) Appx. p. 92a; Juris. St. (Gentles) Appx. p. B-35.]

III.

There Is No Constitutional Requirement That the State Afford a Contracting Party Escape From a Contract of Which He Repents.

Throughout their arguments Appellants seem to assume that the Insurance Commissioner was required to determine that the mutualization price was fully compensatory before he could properly "approve" the plan.

But the State law, as laid down by its courts, and the policy of California, is to the contrary.

The opinion of the District Court of Appeal is specific:

> "The basic problem for the Commissioner to determine was whether or not the price and terms of

payment for the New Company stock were fixed in accordance with the mutualization agreement, for if they were, the Plan of Mutualization is fair and equitable because it gives the stockholder the price and terms he agreed to take." [Juris. St. (Co.) Appx. p. 91a; Juris. St. (Gentles) Appx. pp. B-33-4.] [See also Superior Ct. opinion, Juris. St. (Co.) Appx. p. 121a; Juris. St. (Gentles) Appx. p. C-31.]

Indeed, it is the policy of California to permit security holders who may desire to sell their securities to make their own decisions in the absence of fraud, even though a state officer might feel that they were selling at too low a price.

Transportation Bldg. Co. v. Dougherty (1946), 74 Cal. App. 2d 604, 614.

California has conclusively determined that the duty of the Commissioner under her statute did not require him in the circumstances of the case, to determine that the agreed price was fully compensatory.[19]

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[19]We suggest that "approval" of a transaction by a public officer does not necessarily require an examination into the interests of all persons whose rights may be affected thereby. It depends on the purpose of the statute. Thus, where an exploration permit may not be assigned without the "approval" of the Secretary of the Interior, the assignor is not entitled to the decision of that officer that the consideration for his assignment is adequate. (Analogy suggested by *Atlantic Pacific Oil Co. v. Gas Dev. Co.* (1937), 105 Mont. 1.) An employer, contracting for an increase in wages during wage stabilization is not unconstitutionally deprived of his property by a blanket approval of all pending applications at the repeal of Stabilization. (Analogy suggested by *American Fed. of Grain Millers v. General Mills, Inc.* (D. C. Minn. 1953), 117 F. S. 340.) One who has contracted to buy property at cost plus 10 per cent, but not above the ceiling price, is not unconstitutionally deprived of his property by an increase in that ceiling price which results in his paying a higher price. (Analogy suggested by *Nesseth v. Creedon* (D. C. Minn. 1948), 80 F. S. 269.)

No authority has been called to our attention suggesting that the State is constitutionally required to relieve a contracting party of his contract merely because he later considers it to have been unwise.

IV.

There Was Ample Evidence That the Price Fixed Was Adequate.

As the State courts have pointed out, the only evidence introduced before the Commissioner was that the mutualization price was adequate.[20] The witnesses were eminently qualified, and their testimony was clear.

Appellants seek to place different interpretations on some of the data, and to challenge the conclusions of the experts, on the basis of what the District Court of Appeal terms "mere unsupported suggestions and opinions of counsel."[21]

Even if the Commissioner's judgment in accepting the conclusions of the witnesses had been faulty, it would not amount to a denial of due process.[22]

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[20]*Supreme Court:* Juris. St. (Co.) Appx. p. 14a; Juris. St. (Gentles) Appx. p. A-15.

Dist. Ct. of Appeal: Juris. St. (Co.) Appx. p. 81a-83a, 92a; Juris. St. (Gentles) Appx. pp. B-25, B-35.

Superior Court: Juris. St. (Co.) Appx. pp. 122a-123a; Juris. St. (Gentles) Appx. pp. C-31-34.

[21]Juris. St. (Co.) Appx. p. 92a; Juris. St. (Gentles) p. B-35. See also the remark of Mr. Justice Carter (dissenting) to the effect that the interpretation of such data is matter for experts in the field of insurance. Juris. St. (Co.) p. 60a; Juris. St. (Gentles) p. A-68.

[22]Compare: "Error in judgment in the compromise of liabilities is not a taking of property or an impairment of contract in derogation of the restraints of the Constitution of the United States." *Doty v. Love* (1935), 295 U. S. 64, 74.

We submit, however, that the Commissioner did not err. We note some of the grosser errors in the computations produced by Appellants:

Gentles *et al.* make the fundamental error of assuming that the amount of the surplus of a company must be *added to* the capitalized value of the earnings produced by that surplus (and the other assets) in order to determine the fair value of an enterprise. [Juris. St. (Gentles) p. 27.] This error permeates many of their figures, including their table on page 28.

Their table on page 24 assumes that it is now certain (and was certain in 1948) that the condition of the company in 1974 would be that which the committee estimated. But the committee, recognizing the speculative nature of such estimates, felt that the value should be discounted at 10 per cent per annum for risk.

They assume that no mutualization is fair which does not provide for payment to stockholders not alone of an amount equal to capital and surplus at the time of the plan, but all accretions to surplus until payment is completed (p. 32)—a process which would obviously prevent any mutualization, for on payment of all capital and surplus the economy would be insolvent.[23]

They say that when the purchase price is paid New Company must have some $28,000,000 of surplus (p. 15)—and assume that the stock will then be worth that amount—without observing that the "surplus" will be supplied in large part by the Participating Department,

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[23]Reported cases indicate that the mutualization price is usually far less than capital and surplus: *e. g., Belden v. Union Central* (1944), 143 Ohio St. 329 (mutualization price $3,125,000; capital and surplus $14,800,000).

to which the stockholders have no claim. [See Rehabilitation Agreement, Art. 6, Juris. St. (Gentles) Appx. pp. F-6-10.]

They furnish (p. 34) figures which they represent as the "actual earnings" of two departments of New Company from 1949 to 1952 (which, of course, are not in the record). The figures were contained in Appellants' Opening Brief in the State courts (Op. Br. pp. 127-8). Their propriety and accuracy were challenged.[24] Appellants then abandoned those figures, but substituted (Pet. for Hear., p. 95) figures they represented as the estimated and actual figures for all departments. These figures *increased* the estimate by $1,000,000 and *decreased* the so-called "actual" by more than $1,000,000. Moreover, Appellants' "actual" figure there used had admittedly been increased by eliminating some $2,700,000 of "losses" in the group accident department. In addition, it repeated the errors of classification and duplication that had been pointed out by the witnesses before the Commissioner in discussing the 1949 figures.

The figures are not only outside the record, but are grossly inaccurate.

Appellants complain that the provisions of the Rehabilitation Agreement relative to the writing of participating and non-participating insurance have been "outrageously watered down" [Juris. St. (Gentles) p. 26 note; See also Juris. St. (Co.) p. 28]. The facts are that those

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[24]The earnings for 1949 were available at the hearing before the Commissioner. Appellants there (using figures similar to those now used) asserted that the actual earnings of the Life department were $380,000 as against $138,000 estimated. The witness showed that appellants were not using comparable figures; and that in fact the actual was (on comparable bases) $888,000 against an estimate of $877,000. [Tr. pp. 334-7; Ex. 30.]

provisions of the Rehabilitation Agreement have always been a mere declaration of policy [Art. 20(e); Juris. St. (Co.) Appx. p. 151a; Juris. St. (Gentles) Appx. pp. F-30-31]; that they have not been (and could not have been) altered by the Mutualization Plan; and that the Mutualization Plan provides an *additional* method of enforcement. [Juris. St. (Co.) Appx. pp. 159a-160a; Juris. St. (Gentles) Appx. pp. G-12-13.]

Appellants complain that it is impossible to predict future income. [Juris. St. (Gentles) p. 33.] Such an argument would, of course, destroy all attempts to determine value by the common method of capitalizing earnings.[25] But the entire life insurance industry is predicated on the fact that it is possible to predict, with reasonable accuracy from the long range point of view, not only mortality rates, but interest rates and (generally) earnings, over a period of a lifetime—frequently 50 to 75 years, and (in the case of optional settlements) for periods which may well exceed 100 years.

Moreover, appellants are hardly in a position to object to such predictions; for, as the witnesses pointed out, other methods of valuation would have produced no more than a nominal value for the stock.

It should also be observed that it is only by assuming that the committee's estimates are certain to be realized (which the committee denied in discounting them at a 10 per cent rate for risk) that Appellants are able to produce their rather fantastic figures as to values in 1974 and later.

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[25]As Mr. Justice Holmes remarked, "The commercial value of property consists in the expectation of income from it." *Galveston v. Texas* (1908), 210 U. S. 217, 226.

Nor are the conditions to payment unusual or unreasonable. There are only three [Juris. St. (Co.) Appx. pp. 155a-156a; Juris. St. (Gentles) Appx. p. G-8]:

1. Restoration of non-can benefits; necessarily imposed because the stockholders may not be preferred to creditors.[26]

2. That purchase fund plus capital and surplus shall exceed purchase price: necessary under California corporate law, for if payment of purchase price would exhaust capital and surplus, the Company would be insolvent.

3. That the corporation will retain an excess of assets over liabilities sufficient to enable it to continue to operate; which seems not only a reasonable but an essential condition.[27]

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[26]And, as the trial court observed, under the Rehabilitation Agreement any payment before restoration would not benefit stockholders, but would be repaid into the fund for non-can restoration. [Juris. St. (Co.) Appx. p. 120a; Juris. St. (Gentles) Appx. pp. C-29-30.]

[27]Appellants [*e. g.*, Juris. St. (Gentles) pp. 29, 32] submit arguments based on the hypothesis that it might take twenty years to accumulate such a surplus after non-can restoration is complete. Since the required surplus is rather less than that of the average company of the size of New Company [see Ex. 28, Appx. 10], it seems unlikely that the company would be able to make restoration without a surplus approximating that amount. And when it is considered that a fund is being set aside from the earnings of the Participating Department [Juris. St. (Co.) Appx. pp. 154a-155a; Juris. St. (Gentles) Appx. pp. G-6-7] to meet the purchase price; and that the Participating Department surplus is also available to meet the requirement; it appears that such assumptions are scarcely conceivable. (Note that the 5 per cent of the profits of the participating business available for purchase price are the profits of participating business written *since 1936*. The fund referred to in Juris. St. (Gentles) p. 7 (note) as unlikely to produce substantial profits is one derived only from policies written by Old Company *(i. e., before 1936)*.

Conclusion to Part IV.

We do not pause to analyze all of Appellants' attempted re-interpretation of the evidence.

The fact remains that New Company, in 1948, was earning less than $1,000,000 a year; and the non-can policies had a prior claim to $22,000,000 (plus interest) of those earnings.

The fact remains that under the ordinary methods of valuation, the stock was valueless or of only nominal value. [Ex. 28, p. 23.]

No amount of juggling undiscounted estimates of future profits will serve to disguise the fact that the price of $3,000,000, supported by the uncontradicted testimony of experts of unchallenged ability, is amply supported by the evidence.[28]

V.

There Was No Denial of Procedural Due Process.

Again, it is pointed out that there was no "deprivation" of property. But in addition, the requirements of due process were satisfied.

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[28]Appellants Gentles *et al.* refer [Juris. St. (Gentles) p. 41] to an offer to buy stock of Old Company. The offer was to buy $16,471,058 of 5 per cent redeemable preferred stock—with a sinking fund; and to buy new common stock for $528,943. Since the preferred stock would obviously be well secured, and would be redeemable, that item amounts in effect to a loan. Accordingly, the offer places a value of $1.00 a share on the existing common stock—a total of $508,200 in contrast to the mutualization price of $3,000,000.

A. Due Process Does Not Require Court Review of Administrative Findings of Fact Reached After a Full Hearing.

Appellants were given ample opportunity to be heard before the Insurance Commissioner. There was a full and fair hearing continuing more than two weeks, resulting in a transcript of some 1500 pages. The courts have decided that the Commissioner's findings were sustained "by substantial evidence in the light of the whole record."

Due process does not require a re-examination of the factual questions in the nature of a trial *de novo*.

Alabama Commission v. Southern R. Co. (1951), 341 U. S. 341, 348.

B. There Was No Improper Dual Position; and in Any Event the Rule of Necessity Would Prevent Disqualification of the Commissioner.

As the State Supreme Court suggests [Juris. St. (Co.) Appx. p. 6a; Juris. St. (Gentles) Appx. p. A-7], the fact that Commissioner Carpenter (in 1936) consented to a plan of mutualization to be formulated by a committee, would not disqualify Commissioner Downey (in 1950) from determining the fairness of the plan so formulated.

Moreover, it has long been recognized that a statutory scheme is not to be defeated merely because of some supposed interest or bias of the only official authorized to administer that scheme.

Federal Trade Comm. v. Cement Inst. (1948), 333 U. S. 683, 701;

See:

Evans v. Gore (1920), 253 U. S. 245, 247-8;

Federal Const. Co. v. Curd (1918), 179 Cal. 489, 493-4.

Conclusion.

We have chosen to ignore the personalities in which Appellants indulge.[29]

We cannot, however, permit to go unchallenged Appellant Old Company's attack on the motives [Juris. St. (Co.) p. 30] and actions [Juris. St. (Co.) p. 43] of Commissioner Carpenter.

Appellants do not,[30] and they cannot, refer to any matter in the record which would support those charges.

The contract made by the Liquidator in 1936 was reviewed by the courts at that time. Their order of approval has long been final. Thousands of policyholders have, in the intervening twenty years, bought policies in reliance on the option for mutualization therein contained. Its propriety is now beyond review.

The approval by the Insurance Commissioner here under review contains no element of coercion or compulsion. It deprives no one of anything.

Additionally, it is fully supported by the evidence adduced.

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[29]*E. G.*, Juris. St. (Co.) pp. 13, 14, 23, 29, 44, 49; Juris. St. (Gentles) pp. 10, 33, 41.

[30]There is reference [Juris. St. (Co.) p. 30, n. 15] to allegations of pleadings in the original Rehabilitation proceeding. They must know that those allegations have been found (expressly or by implication) to be untrue: *Carpenter v. Pacific Mutual*, 10 Cal. 2d 307; *Carpenter v. Pacific Mutual*, 13 Cal. 2d 306; *Neblett v. Pacific Mutual*, 22 Cal. 2d 393. They must know that Counsel in the Rehabilitation proceeding was censured by the California court for incorporating in his brief as statements of fact the very allegations of pleadings to which counsel for Appellant Old Company now refers. (*Carpenter v. Pacific Mutual*, 10 Cal. 2d 307, 313-4.)

We respectfully submit that no substantial federal question is presented, and that the decision rests upon adequate non-federal grounds.

The appeal should be dismissed, and certiorari denied.

Respectfully submitted,

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